2003

State of Utah v. Todd May : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH Appellee, vs. TODD MAY, Appellant.	)	CASE NO. 20030004-CA

APPEAL FROM THE DISTRICT COURT
OF WEBER COUNTY, UTAH

The Honorable Ernie W. Jones, District Judge

BRIEF OF APPELLEE

AN APPEAL FROM A JUDGEMENT OF CONVICTION FOR ACTING AS A PRIVATE INVESTIGATOR WITHOUT A LICENSE IN VIOLATION OF UTAH CODE ANN. §53-9-107(2), A CLASS A MISDEMEANOR UNDER §53-9-119, IN THE SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY, THE STATE OF UTAH, THE HONORABLE ERNIE W. JONES PRESIDING.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

CASES

United States Supreme Court Case

Utah State Cases

STATUTES

Utah Code Annotated

Other State Statutes

UTAH RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH Appellee, **vs.** TODD MAY, Appellant.	)	CASE NO. 20030004-CA

APPEAL FROM THE SECOND DISTRICT
COURT OF WEBER COUNTY, UTAH

The Honorable Ernie W. Jones, District Judge

BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Annotated § 78-2a-3(2). The district court entered a final order on March 18, 2002. Notice of this Appeal was filed on December 27, 2002.

ISSUES ON APPEAL AND STANDARD OF REVIEW

First Issue on Appeal: Did the State prove beyond a reasonable doubt that the sting operation occurred when Defendant was not licensed as a private investigator?

Standard of Review: This is a question of fact, and thus an Appellate court

should apply the clearly erroneous standard to the trial court's factual findings because the trial court's advantaged position in judging credibility and resolving evidentiary conflicts. *State v. Thurman*, 846 P.2d 1256, 1270 (Utah 1993)(The trial court's findings of fact in support of its ruling will not be set aside unless they are shown to be clearly erroneous).

Second Issue on Appeal: Did the trial court correctly apply §53-9-107 and §53-9-102(17) in determining that Defendant acted as a private investigator without a license?

Standard of Review: The trial court's interpretation of a statute is a question of law that an Appellate court reviews for correctness. *In Re Adoption of B.T.D.*, 68 P.3d 1021, 1025 (Utah Ct. App. 2003). The Appellate court reviews the district court's determination for correctness and gives no deference to its legal conclusions. *Grand County v. Emery County*, 52 P.3d 1148, 1151 (Utah 2002).

Third Issue on Appeal: Whether Defense Counsel's failure to obtain and listen to a tape of the conversation defendant had with an undercover investigator amounts to ineffective assistance of counsel.

Standard of Review: An Appellate court must determine as a matter of fact and law whether Defendant was denied effective assistance of counsel. In order to succeed on an ineffective assistance of counsel claim, Defendant must show (1) trial counsel's performance was deficient by falling below an objective standard of reasonableness, and (2) trial counsel's deficient performance prejudiced Defendant by depriving him of a fair trial. *State v. Holbert*, 61 P.3d 291 (Utah 2002). When presented with an ineffective

assistance of counsel claim for the first time on appeal, review of counsel's performance under this test is highly deferential when there is no prior evidentiary hearing. *Id.* at 297.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

United States Constitution, Fourteenth Amendment § 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. §53-9-102(17).

> "Private investigator or private detective" means any person, except collection agencies and credit reporting agencies, who, for consideration, engages in business or accepts employment to conduct any investigation for the purpose of obtaining information with reference to: . . . [certain listed areas].

Utah Code Ann. §53-9-107(2)(a).

> (2) Unless licensed under this chapter, a person may not:
> (a) act or assume to act as, or represent himself to be:
> (i) a licensee; or

> (ii) a private investigator or private detective as defined in Subsection 53-9-102(16) or conduct any investigation as provided in subsection 53-9-102(16)(The current code mistakenly refers to subsection 16 when it should be 17)(This brief will refer to subsection 17 when appropriate).

Utah Code Ann. §53-9-119.

> Any person who violates any provision of this chapter is guilty of a class A Misdemeanor.

STATEMENT OF THE CASE

Defendant was charged with representing himself as a private investigator when he was without a license in violation of Utah Code Ann. §53-9-107(2). R. 001-002. Following a bench trial, the trial court found Defendant guilty. R. 014-016. Defendant was sentenced to 30 days in jail or a $750 fine. R. 014-016. Defendant then filed an untimely appeal. R. 026, 032-033. Defendant was resentenced on December 11, 2002. R. 038. Defendant then filed this timely appeal on December 27, 2002. R. 050.

STATEMENT OF THE FACTS

In May 1996, Defendant received a valid private investigator's license from the Department of Public Safety. This license was renewed in May 1998. R. 56:15. In May 2000, Defendant failed to renew his private investigator's license. R. 56:15. After the expiration of Defendant's license, the Department of Public Safety sent him application forms to reapply for the private investigator's license; left a voice mail outlining how he was to reapply; and a sent letter on November 13, 2000, stating he was not to work as a

private investigator until he was relicensed to do so. R. 56:16-17. Defendant failed to reapply for a private investigator's license until December 27, 2001. R. 56:16. Defendant was still without a license at the time of trial. R. 56:22.

During the summer of 2001, Dick Martin, a private investigator, became concerned that Defendant was functioning as a private investigator without a license. Dick Martin contacted Steve Anderson, an agent for the Department of Public Safety, and the two set up a sting operation to investigate Defendant's actions. R. 56:20.

On August 27, 2001, Steve Martin, Dick Martin's son, went to Defendant's place of business and told Defendant a fictitious story by stating that he was concerned his fiancee was having an affair. R 56:57. However, before entering Defendant's place of business, Steve Martin concealed a tape recorder to record the conversation. R. 56:69. After hearing Steve Martin's story, Defendant offered to conduct a private investigation. R. 56:57-58, 63-66. Steve Martin did not hire Defendant because he did not have the $500 retainer Defendant wanted and he was still "shopping" around. R. 56:64, 66. Based upon the events of the sting, Defendant was charged with acting as a private investigator without a license. R. 001-002.

A week before trial, the State received the tape containing the alleged conversation between Defendant and Steve Martin. R. 56:118. The prosecutor notified Defense Counsel and made available the tape. R. 56:118. Defense counsel refused the tape because he thought the tape would not be necessary. R. 56:118. On March 18, 2002 a

bench trial was held where Defendant was convicted of the charge. R. 014-016. Defendant was sentenced to 30 days jail or a $750 fine. R. 014-016.

Defendant filed a *pro se* notice of appeal on May 17, 2002. R. 026. Through assistance of current counsel, Defendant sought to have his untimely appeal construed as an extension of time to file an appeal. The Appellate Court ruled that the appeal was untimely and did not seek an extension of time. R. 030. On December 11, 2002, Defendant was resentenced. R. 038. On December 27, 2002, Defendant filed this timely appeal. R. 050.

SUMMARY OF ARGUMENTS

First, time is not an express statutory element of the crime of representing oneself as a private investigator without a license. Because the State charged Defendant with functioning as a private investigator without a license, the State's burden is to prove Defendant acted as a private investigator when he was not properly licensed. Even if the State failed to prove the exact date in which the sting operation occurred, the uncontradicted evidence is that Defendant's private investigator license expired in May 2000, that the sting operation occurred between the summer of 2001 and December 2001, Defendant did not attempt to renew his license until December 2001, and Defendant was still unlicensed at the time of trial. Even if the State failed to prove the exact date of the sting, the State has proven that the sting occurred well after the license expired, and well before Defendant even applied for a new license. Given these facts, it was not clear error

for the trial court to conclude that the State proved, beyond a reasonable doubt, that Defendant solicited his services as a private investigator during the period he was not licensed to do so.

Second, the trial court properly interpreted subsection 102(17) of the Private Investigator Regulation Act ("Act") in concluding that the statute does not require actual exchange of consideration between two parties. UTAH CODE ANN. §53-9-102(17). Subsection 102(17) of the Act only requires that consideration be part of the basis of the bargain; nowhere in the statute does it specifically state that consideration must actually be exchanged between two parties. Testimony offered by Steve Martin unequivocally shows Defendant solicited his private investigative services for consideration, but consideration was not exchanged because Martin did not have the amount of money Defendant wanted as a retainer.

Finally, tactical decisions which ultimately prove unfruitful at trial do not amount to ineffective assistance of counsel. Defendant's counsel chose not to listen to a tape containing an alleged conversation between Defendant and Steve Martin. When the tape was made available a week before trial, Defense counsel already had a theory of the case that did not necessitate the tape. Defense counsel was familiar with the case and the facts because he had the report of the incident and his client told him of the conversation. Thus, he could properly exclude the tape as unnecessary evidence. Such a tactical decision not to seek this evidence made after reasonable investigation does not amount to

ineffective assistance of counsel.

Even if this Court finds that Defense counsel's decision amounts to ineffective assistance of counsel, Defendant has still failed to specify how the failure to obtain the tape was prejudicial to his defense. Instead, Defendant offers sweeping and conclusory statements which require the Court to speculate as to how the failure to obtain such a tape might amount to ineffective assistance of counsel. This Court should not engage in such speculation, but should reject Defendant's argument because he has failed to establish either prong of the ineffective assistance test outlined in *Strickland v. Washington,* 466 U.S. 688 (1984).

ARGUMENT

I.

THE STATE PROVED BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS NOT LICENSED AS A PRIVATE INVESTIGATOR WHEN HE SOLICITED HIS SERVICES AS SUCH.

Generally, the time an offense was committed is not an element that the prosecution must prove at trial. *State v. Fulton*, 742 P.2d 1208, 1213 (Utah 1987); *State v. Bates*, 784 P.2d 1126 (Utah 1989). However, there are instances when time must be proven, such as when time is an express statutory element. Some examples may be if the statute of limitations has almost run, if the defendant asserts he was of requisite age, or if the age of the victim would prevent the act from being criminal. In such situations, the prosecution bears "the burden to prove [time as an additional aspect or element of its

case] beyond a reasonable doubt." *Fulton*, 742 P.2d at 1213.

It is well settled that the law makes no distinction between direct evidence and circumstantial evidence as to the degree of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing qualities required by law.

In this case, the State marshaled both direct evidence and circumstantial evidence to prove beyond a reasonable doubt that the sting operation occurred when the Defendant was not licensed as a private investigator. First, Defendant admits in his own version of the facts that the sting operation occurred on August 27, 2001. (Brief of Appellant at 6). Because Appellant is duty-bound to make only true and accurate representations to the Court, this Court should accept this admission as a true fact. *See Utah R. Civ.P. 11(b).*

Second, an evaluation of Steve Anderson's testimony reveals that before May 2000 Defendant had a valid private investigator's license, but failed to renew it after several unsuccessful attempts by Steve Anderson to get him to renew it. The sting operation occurred after Defendant's private investigator license lapsed:

Q. Okay. Again, as your position a, in keeping the records of licenses a, are there any other licenses issued to Todd May for private investigative work?

A. No, there's not.

Q. Has that license been renewed?

A. It has. He's renewed it once since 1996. Licenses are good for two years. He a, got the initial license in '96 and he renewed, renewed in '98. And then this one expired in 2000 and he failed to renew it since.

Q. So since May of 2000 has there been any renewal?

A. . . . [H]e reapplied a, let's see, December 27th, 2001 after he was charged [with acting as a private investigator without a license].

R.56:15.

Q. When did you decide to do a sting operation?

A. Oh, I can't remember exactly when I made the first decision. It was a, after he had ignored the a, applications that we had sent him I was planning on contacting another member of our department to go in there. So it was last summer [2001] a, that it I had planned on doing something.

R.56:24.

Anderson's conversation with the trial judge explicitly proves that the sting was conducted only after Defendant's license expired:

The Judge: And why were you considering a sting operation?

The Witness: Because Todd May failed to a, get licensed after repeated attempts.

R. 56:51.

A fair and accurate reading of Steve Anderson's testimony confirms that the prosecution proved beyond a reasonable doubt that Defendant was licensed as a private

investigator until May 2000, the sting operation occurred between the summer of 2001 and December 2001, and Defendant was not licensed as a private investigator at the time of the sting operation.

The prosecutor's direct examination of Steve Martin reveals that the sting occurred approximately during the summer of 2001:

Q. Okay. Do you recall the date [of the sting]?

A. It was September of last year from what I recall. I don't recall a date, no.

Q. Okay. Could it have been in August?

A. It could have been.

R.56:54.

The sting occurred on August 27, 2001. Even though Steve Martin could not remember the exact date, he clearly remembers the general time frame of the sting. The veracity of his testimony is corroborated by Anderson's testimony that the sting occurred between the summer of 2001 and December 2001. Regardless of whether the sting occurred during August or September, this is still well beyond the expiration of Defendant's private investigative license, and well before Defendant attempted to renew his license. Defendant himself admits he has not had a valid license since 2000. R. 56:98. Therefore, even if the prosecution failed to prove the exact date in which this sting operation occurred, the State met its burden by showing the encounter occurred while the Defendant was without a license.

Trial courts are afforded great deference in resolving factual issues because of their ability to evaluate the credibility of the witnesses. *State v. Thurman*, 846 P.2d at 1270. Here, the trial court was required to listen and to evaluate the credibility of the witnesses in resolving the factual disputes of whether the sting occurred when the Defendant was without a license and whether Defendant's actions amounted to a violation under §53-9-107(2). Based on their testimony, the trial court found Defendant guilty. Applying a deferential standard to the trial court's verdict, it cannot be said that the trial court was clearly erroneous in concluding that Defendant represented himself as a private investigator and he agreed to do private investigative work for a fee while he was not properly licensed.

Additionally, because time is not an express statutory element of this crime, "the prosecution does not have to prove the precise time of the offense, [and] insufficiency of the evidence on [this] point is not a ground upon which the verdict can be attacked." *Fulton*, 742 P.2d at 1213.

II.

THE TRIAL COURT CORRECTLY APPLIED §53-9-107 TO FIND DEFENDANT GUILTY OF ACTING AS A PRIVATE INVESTIGATOR WITHOUT A LICENSE.

Section 107 of the Act states:

> [u]nless licensed under this chapter, a person may not: (a) act or assume to act as, or represent himself to be: (i) a licensee; or (ii) a private investigator or private detective as defined in Subsection 53-9-102(16) or conduct any investigation as provided in Subsection, 53-9-201(16). [meaning (17)]

UTAH CODE ANN. §53-9-107(2).

The definition of private investigator is located earlier in this section of the code.

> 'Private investigator or private detective' means any person, except collection agencies and credit reporting agencies, who, for consideration, engages in business or accepts employment to conduct any investigation for the purpose of obtaining information with reference to: . . . [certain listed areas].

UTAH CODE ANN. §53-9-102(17).

Whether the trial court correctly applied the preceding statutes is a matter of statutory interpretation.

> The primary rule of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve. To discover that intent, we look first to the plain language of the statute.

Harmon City, Inc. v. Nielsen & Senior, 907 P.2d 1162, 1167 (Utah 1995) (Internal quotations omitted).

> In analyzing a statute's plain language, we must attempt to give each part of the provision a relevant and independent meaning so as to give effect to all of its terms.

State v. Burns, 4 P.3d 795, 800 (Utah 2000).

Evaluating section 107's plain language reveals that its intent is to prevent individuals from functioning as a private investigator without a license. Legislatures often enact licensing statutes for the "protection of members of the public who rely on licensed . . . [professionals] to perform tasks that require a high degree of honesty and integrity." *Global Recreation, Inc. v. Cedar Hills Development Co.*, 614 P.2d 155, 158 (Utah 1980). Private investigators conduct activities that clearly require honesty and integrity to prevent unscrupulous individuals from committing blackmail or extortion. The legislature has chosen to combat this problem by requiring individuals and companies to obtain a license before engaging in these activities. This is clear from section 107's section title, "License required to act." This section specifically explains that individuals need licenses to function as private investigators. The following section, section108, outlines in length the qualifications for licensure. Analyzing section 107 in relation to section 108 and the other Chapter 9 sections confirms that the legislative intent was to prohibit individuals from functioning as a private investigator without a license.

Examination of those individuals and companies excluded further confirms the need to construe private investigation activities broadly. Collection agencies, credit reporting agencies, persons or employees conducting personal investigations or investigations for their employer, and employees of licensed attorneys are excluded from the definition of private investigator. UTAH CODE ANN. § 53-9-102(17)(a-b). This is most likely because these businesses and individuals are regulated under other provisions

of the Utah Code. Collection agencies are regulated by § 12-1-1. Credit reporting agencies are regulated by § 76-6-517, § 7-14-5, and others. Attorneys, who have a direct responsibility for the conduct of their employees, are regulated by the Rules of Professional Conduct, specifically Rule 5.3. Private persons were probably excluded because they are not working for another. Employees were probably excluded because another person has direct supervisory authority and potential liability for their wrongs under the tort theory of respondeat superior. Thus, all of these people and businesses have checks on them that general private investigators do not; hence the need for the licensing statute to protect members of the public is clear.

The prosecution proved beyond a reasonable doubt that Defendant did not have a license at the time of the sting. Defendant violated section 107 because he *represented* himself as a private investigator. Steve Martin's testimony unequivocally shows that Defendant represented himself as a private investigator:

> **Q**. . . . So what did you present him [Defendant] with? What did you ask him or–
>
> **A**. I just asked him a, I asked him if, what kind of operations they ran, a, if they would be able to conduct an investigation, a, I–
>
> **Q**. Okay.
>
> **A**. He asked me to explain about my fiancee that might be having a–
>
> **Q**. What type, did he indicate what type of operations they ran?
>
> **A**. Private investigations.

R.56:57-58.

Q. Did he [Defendant] ever use the term private investigations?

A. Yes, sir.

Q. Did he use the term investigation?

A. Yes.

R.56:63-64.

Q. . . . Did a, the defendant ever mention who would be doing the investigative work?

A. Yes, he did.

Q. And who did he say?

A. Himself and Ryan.

Q. Okay. Was that the defendant speaking?

A. Yes, sir.

Q. And a, did you specifically ask him that question or–

A. Yes, I did.

Q. Okay. And do you recall if you used the term investigating?

A. Yes. I asked a, specifically who would be doing the investigation. And he said myself and Ryan.

Q. When did they want to get started?

A. Right away, actually. They wanted to start right away. But I, for one didn't have

the cash if I would have, and two, I was on my way to work. I was shopping. R.56:65-66.

Subsection 107(2) of the Private Investigator Regulation Act states that it is a violation to represent oneself or act as a private investigator without a license. During the course of the conversation with Steve Martin, Defendant unambiguously offered to act as Steve Martin's private investigator for a fee at a time which he had no valid license. In applying the plain language of the statute, the trial court correctly found Defendant represented himself as a private investigator without a license in violation of section 107.

Defendant alleges he does not satisfy the statutory language of subsection 102(17) because he did not receive any consideration from Steve Martin. This contention is erroneous. Nowhere in subsection 102(17) does it state that a person must receive or exchange consideration before they qualify as a private investigator: "'Private investigator or private detective' means any person . . . who, for consideration, engages in business or accepts employment to conduct any investigation for the purpose of obtaining information . . . ." A fair reading of the plain statutory language shows that the investigative work must simply be done for consideration. Whether there is actual exchange of consideration is irrelevant so long as consideration is part of the basis of the bargain.

For example, New York's definition of private investigator states, "the business of private investigator . . . shall . . . mean . . . the making for hire, reward or for any

consideration whatsoever, of any investigation . . . ." N.Y. McKinney's General Business Law § 20-7-71(1) (2003). New Mexico's law states that a private investigator is "a person who for any consideration whatsoever engages in business or accepts employment to conduct investigation for the purpose of obtaining information . . . ." N.M. STAT. ANN. § 61-27A-2(L) (Michie 2003)(Repealed effective July 1, 2006). Consideration was the legislatures chosen word to convey the meaning of the statute which is to prevent individuals from accepting business for hire to conduct private investigations.

The legislature could have required the actual exchange of consideration if it had wanted to by inserting language to that effect in this statute. *See* UTAH CODE ANN. § 31A-21-302(2) (stating "no person may charge or *receive* any consideration for the insurance policy which is not stated in Subsection (1))(emphasis added). *See also* UTAH CODE ANN. § 61-1-2(1) (stating "[i]t is unlawful for any person who *receives* any consideration from another person primarily for advising the other person as to the value of securities or their purchase . . . .")(emphasis added).

In fact, Utah Code § 76-7-203 is more analogous to the private investigator statute. The statutes states that, "Any person while having custody care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child, for an in consideration of the payment of money or other thing of value is guilty of a felony in the third degree." The Utah Supreme Court held that under this statute it was not necessary to show that the defendant "actually received the consideration, so long as there was

sufficient evidence that she attempted to engage in a transaction which would have let to her receiving consideration." *State v. Verde*, 770 P.2d 116, 124 (Utah 1989)(reversed on other grounds). By requiring an actual exchange of consideration, the provisions of subsection 107(2), which prohibit the representation of oneself as a private investigator, would be rendered meaningless. *See Burns*, 4 P.3d at 800 (stating courts should attempt to give effect to all of a statute's terms). Furthermore, for purposes of section 107, to represent oneself is similar to an attempt to act as a private investigator which is similar to the statute prohibiting the sale or attempted sale of a child.

Defendant meets this portion of the private investigator statute which discusses consideration because, as Steve Martin's direct examination shows, Defendant discussed receiving consideration for the investigation:

Q. Did you talk about expenses?

A. Yes, we did.

Q. And costs?

A. He said that it would be $1,000 retainer a, with $500 up front to start the investigation.

Q. Okay. And what would they use the $500 for, did they mention?

A. Just for a, equipment, fees, setting up surveillance equipment, a, driving. R.56:64.

Martin's testimony shows the Defendant ready, willing and able to begin investigating Martin's fiancee. Defendant unambiguously asks for a money retainer, which he did not receive because Steve Martin was "shopping" around. R.56:66. The only reason investigation did not commence was because Steve Martin did not pay Defendant the retainer. However, even though no money was exchanged, Defendant still fits within the definition of private investigator because consideration constituted the basis of the bargain to perform the investigation. Appellate would not have undertaken the investigation freely. The definition of private investigator read in conjunction with subsection 107(2)'s language, which states an unlicenced person cannot "act or *assume to act as, or represent* himself to be . . . a private investigator," clearly prohibits both the act of being a private investigator for hire and the representation of being a private investigator for hire. The trial court properly made this distinction and rejected Defendant's erroneous reading of the statute.

III.

DEFENSE COUNSEL'S FAILURE TO OBTAIN AND LISTEN TO A TAPE OF A CONVERSATION DEFENDANT HAD WITH AN UNDERCOVER INVESTIGATOR DOES NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL MADE HIS DECISION AFTER REASONABLE INVESTIGATION.

The Sixth Amendment to the U.S. Constitution, in part, provides, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of counsel for his defence." The right to counsel has been interpreted to mean the "effective assistance of counsel." *State v. Templin*, 805 P.2d 182, 186 (Utah 1990).

In order to prevail on an ineffective assistance of counsel claim, a defendant must satisfy the two prong test outlined in *Strickland v. Washington*, 466 U.S. 688 (1984). "Defendant has the burden of meeting both parts of this test." *Templin*, 805 P.2d at 186. The first prong requires a defendant show that counsel's performance was "deficient", in the sense that counsel made errors serious enough to prejudice the defendant's right to a fair trial. *Strickland*, 466 U.S. at 687. The second prong requires a defendant show that counsel's deficient performance was prejudicial to his defense. *Templin*, 805 P.2d at 186-87. The purpose of the *Strickland* test is to protect the defendant's constitutional right to a fair trial. *Strickland*, 466 U.S. at 684.

When examining counsel's deficiency,

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining

> counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy'.

Id. at 689 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101 (1955)). *See State v. Tyler*, 850 P.2d 1250, 1258 (Utah 1993) (deciding that "competency of counsel is not measured by the result")(internal quotations omitted); *State v. Jones*, 823 P.2d 1059, 1063 (Utah 1991) (finding that courts "will not review counsel's tactical decisions simply because another lawyer, e.g., appellate counsel, would have taken a different course"); *State v. Bullock*, 791 P.2d 155, 160 (Utah 1989) (concluding that a legitimate exercise of professional judgment in the choice of trial strategy that does not produce the results expected does not constitute ineffective assistance of counsel); *State v. Tennyson*, 850 P.2d 461, 465 (Utah Ct. App. 1993) (finding that a court "will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect").

In the instant case, Defendant alleges his attorney rendered ineffective assistance of counsel when he failed to obtain and listen to the alleged conversation taped between Defendant and Steve Martin. This argument is without merit.

Counsel is effective if he or she makes tactical decisions after reasonable investigation. *State v. Huggins*, 920 P.2d 1195, 1198-99 (Utah Ct. App. 1996). In

Huggins, the Court of Appeals stated, "counsel has a duty to make reasonable investigations *or to make a reasonable decision that makes particular investigation unnecessary*." *Id.* (quoting *Strickland*, 466 U.S. at 690-91). Defense counsel's refusal to seek the tape as additional evidence was a tactical decision made after reasonable investigation. Approximately a week before trial, the prosecutor received the tape containing the alleged conversation recorded during the sting. He called and made it available to Defense counsel. R. 56:118. Defense counsel refused the tape because he already had a copy of the incident report, which contained a description of the tape's contents and he had a description of the conversation from his client. Counsel most likely viewed the tape as unnecessary because he sought to defend the case on the following grounds: that Defendant was properly licensed to perform the services he offered, R. 56:10,40; that Defendant did not fit the statutory language he was accused of violating, R. 56:10, 71-78, 124-27; and that the sting was a government action enforcing a non-competition agreement, R. 56:10, 122-23. Counsel's refusal to listen to the tape apparently rested on the rational that the information gained from the tape would be cumulative and unnecessary. R. 56:118. Defense Counsel's decision was made after reasonable investigation to determine what the contents of the tape were.

It may be reasonably inferred from the foregoing events that when this tape surfaced a week before trial, that Defense counsel already had his theory of the case. As part of his defense strategy, counsel would not to dispute what was said during the sting,

but rather assert that Defendant was licensed to offer such services, that Defendant did not fit the statutory language, and that this was a government action enforcing a non-competition agreement. These defense theories necessarily rendered the actual conversation contained on the tape irrelevant and unnecessary. Though these defense theories proved unfruitful at trial, it does not amount to ineffective assistance of counsel simply because counsel elected to go forward with one theory as opposed to another. Counsel may have viewed the tape has harmful and thus been relieved it was not offered at trial. *See Fernandez v. Cook*, 870 P.2d 870, 876-77 (Utah 1993)(stating that if counsel believes that pursuing certain investigations would be fruitless or harmful, then a court should not question that decision on trial strategy unless it was based on an unreasonable belief). A court should not second guess trial tactics such as what objections to make, what witnessed to call, and what defenses to interpose. *Id.* at 876.

One of the issues raised on this appeal is that Defendant does not meet the statutory language of section 107. This is precisely one of the grounds upon which Defense counsel sought to defend Defendant at trial. Defendant cannot now assert that such a theory was unreasonable and amounts to ineffective assistance of counsel. "[A]n unfavorable result is not sufficient for and does not give rise to a conclusion of ineffective assistance of counsel." *State v. Buel*, 700 P.2d 701, 703 (Utah 1985).

Though Defense counsel's theory of defense may have been a poor one in retrospect, the Court must still indulge in the strong presumption that counsel's actions

might be considered sound trial strategy and fall within the broad parameters afforded counsel. Defense counsel was very familiar with the facts, circumstances and law regarding this case. It was only a week before trial when the prosecutor obtained and offered the tape. R. 56:118. It is apparent that Defense counsel had already devised a theory of the case which rendered the additional evidence of the tape unnecessary. Choosing not to review what he viewed as unnecessary because it did not corroborate his theory of the case is not unreasonable. Therefore, applying the *Strickland* presumptions to the facts, Defendant does not satisfy the first prong test, and thus fails the ineffective assistance of counsel test.

The second prong requires a defendant show that counsel's deficient performance was prejudicial to his defense. To demonstrate prejudice, a defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Defendant's proof of ineffective assistance of counsel cannot be based on a speculative matter, but must be based on a demonstrable reality. *State v. Coonce*, 36 P.3d 533, 539 (Utah Ct. App. 2001)(quoting *Fernandez*, 870 P.2d at 877. Here, Defendant's allegations only amount to speculation.

Defendant states that "[b]y failing to obtain the tape Defendant's attorney was not prepared to conduct an effective cross examination, he was unable to resolve and prepare

the State's witness and the Defendant, and he was incapable of being able to properly advise the Defendant whether he ought to go to trial or accept a plea bargain." (Appellant's brief at 18). These conclusory statements fail the *Strickland* test's second-prong by failing to show how these allegations were prejudicial to Defendant.

Defendant must direct the Court to a particular piece of evidence *from the tape* which would have resulting in a reasonable probability of a different outcome at trial. *Coonce*, 36 P.3d at 539. In *Coonce*, the defendant claimed his counsel was ineffective because he failed to impeach a witness with her tape-recorded statements made to the police. But because the contents of the tape we not in the record, the Utah Court of Appeals dismissed this claim as speculative. *Id.*

Defendant fails to identify any section of the cross examination that was prejudicial to his defense because Defense counsel failed to listen to the tape. Defendant fails to identify any specific part of the record showing prejudice because of Defense counsel's inability to resolve and prepare the State's witness and the Defendant. Defendant fails to show how the lack of the tape prevented Defense counsel from effectively advising him during plea negotiations. For all the above allegations, Defendant has failed to provide the Court with any supporting evidence, either pursuant to Rule 23B, Utah Rules of Appellate Procedure, or by citing to any of part of the record to support his ineffective assistance claim. By failing to provide the Court with any supporting evidence, this Court should decline to even consider it. *See State v. Callahan*,

866 P.2d 590, 593 (Utah Ct. App. 1993) (disposing of claim of ineffective assistance of counsel where neither the record nor defendant's brief identified witnesses that counsel failed to subpoena or alleged the substance of their testimony).

By failing to cite to anything specific in the record, Defendant asks this Court to indulge in speculation as to how Defense counsel's actions were prejudicial. However, courts should not entertain such conclusory and speculative arguments. *See Fernandez*, 870 P.2d at 877 ("Proof of ineffective assistance of counsel cannot be a speculative matter but must be demonstrable reality."). Therefore, by failing to marshal any evidentiary support showing how the result at trial would have been different had Defense counsel sought the tape, Defendant has not satisfied the second prong of the *Strickland* test.

Appellant also alleges that Defense counsel's failure to object to the Prosecutor's statement as the date of the sting amounts to ineffective assistance of counsel. Because proof of the exact date of the offense is not a requirement in this case, and the State proved beyond a reasonable doubt that the sting occurred when Defendant was not licensed, Defense counsel's failure to object amounts, at most, to harmless error.

If a defendant fails to satisfy both prongs, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Templin*, 805 P.2d at 186 (stating that the defendant bears the burden of proof in establishing that he was denied a fair trial). Here, Defendant has failed to satisfy either prong of the *Strickland* test, and thus was afforded effective assistance of counsel.

CONCLUSION

The State has met its burden to prove, beyond a reasonable doubt, that Defendant solicited his services as a private investigator when he was without a license. Furthermore, the Act does not require an actual exchange of consideration. Finally, the Defendant has failed to establish that his counsel was ineffective. The defendant has failed to identify any specific prejudice he suffered because of defense counsel alleged error. For the foregoing reasons, the State respectfully requests the Court to affirm Defendant's conviction. No addendum is necessary.

Dated this 18 day of September 2003.

Gary R. Heward
Deputy Weber County Attorney

MAILING CERTIFICATE

I hereby certify that two copies of the attached brief of Appellee were mailed, postage prepaid, to:

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